

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ROBERT ALLEN GOODLOW,

Case No. 3:18-cv-00323-MMD-CLB

Petitioner,

v.

ORDER

WARDEN BAKER, *et al.*,

Respondents.

I. SUMMARY

On February 4, 2020, this Court entered an order concluding that the petition for writ of habeas corpus in this case is a mixed petition—i.e., a petition containing both exhausted and unexhausted claims. (ECF No. 45.) Accordingly, the Court provided Petitioner with the choice of either abandoning the unexhausted claims and proceeding on his remaining claims, voluntarily dismissing his petition without prejudice in order to return to state court, or filing a motion for a stay and abeyance, asking this Court to hold his exhausted claims in abeyance while he returns to state court. (*Id.*)

In response, Petitioner filed two motions: a motion to excuse exhaustion due to futility and a motion for stay and abeyance. (ECF Nos. 46, 47.) For reasons that follow, the motion to excuse exhaustion will be granted and the motion for stay and abeyance will be denied.¹

II. PROCEDURAL BACKGROUND

In March 2012, Goodlow pled guilty in the Eighth Judicial District Court for Clark County, Nevada, to one count of attempt sexual assault with use of a deadly weapon and

¹The Respondents did not file a response to either motion.

1 one count of battery with the intent to commit a crime. (ECF No. 31-21.) In June 2012,
2 Goodlow, through counsel, notified the trial court that he would like to withdraw his guilty
3 plea. (ECF No. 31-23 at 3.) In July 2012, the trial court denied Goodlow's motion to
4 withdraw his plea and sentenced him to 240 months with parole eligibility after 96 months
5 on the former count, with a consecutive like term for a deadly weapon enhancement, and
6 a concurrent 120 month term on the latter count with parole eligibility after 48 months.
7 (ECF. No. 31-28.) A judgment of conviction was entered on July 25, 2012. (ECF No. 31-
8 31.)

9 Goodlow appealed. The Nevada Supreme Court reversed the judgment of
10 conviction and remanded the case, directing the district court to appoint Goodlow new
11 counsel to assist him with his motion to withdraw his guilty plea. (ECF No. 31-45.) On
12 remand, the district court denied Goodlow's counseled motion to withdraw his guilty plea
13 after holding an evidentiary hearing. (ECF No. 31-67; ECF No. 32-4.) Goodlow appealed.
14 In January 2015, the Nevada Court of Appeals affirmed Goodlow's judgment of conviction.
15 (ECF No. 32-20.)

16 In June 2015, Goodlow filed a petition for writ of habeas corpus in the state district
17 court. (ECF No. 32-22.) With assistance of appointed counsel, he filed a supplement to
18 his petition. (ECF Nos. 33-4, 33-5.) The district court denied relief. (ECF No. 33-15.)
19 Goodlow appealed. In April 2018, the Nevada Court of Appeals affirmed the lower court.
20 (ECF No. 33-44.)

21 Goodlow initiated this federal habeas proceeding on June 29, 2018. (ECF No. 6 at
22 1.) Pursuant to this Court's screening order (ECF No. 5), Goodlow filed an amended
23 petition. (ECF No. 8.) Goodlow was subsequently granted leave to amend his petition
24 again. (ECF No. 28.) On April 26, 2019, he filed his second amended petition (ECF No.
25 29), which the Respondents' moved to dismiss. (ECF No. 30). In ruling upon that motion,
26 this Court determined that the second amended petition contained unexhausted grounds
27 for relief, specifically, Grounds One and Four, and the portion of Ground Five premised on
28 counsel's failure to challenge the sentence enhancement. (ECF No. 45.)

III. DISCUSSION

A. Motion to Excuse Exhaustion

In his motion to excuse exhaustion due to futility, Petitioner points out that if he were to present his unexhausted claims to the state court, Nevada's well-established procedural bars would result in the dismissal of his claims. (ECF No. 46.) He concedes that he would not be able to make the necessary showing, under Nevada law, to overcome the procedural defaults. (*Id.* at 12-14.)

In addition to the exhaustion requirement, a federal court may not hear a habeas claim if a petitioner has defaulted the claim in state court under an independent and adequate state procedural rule and the petitioner cannot demonstrate either (1) cause for the default and actual prejudice as a result of the alleged violation of federal law or (2) that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Claims can be procedurally defaulted in federal court even if they are not exhausted in state court. *Cooper v. Neven*, 641 F.3d 322, 328 (9th Cir. 2011). "[I]f a claim is unexhausted but state procedural rules would now bar consideration of the claim, it is technically exhausted but will be deemed procedurally defaulted unless the petitioner can show cause and prejudice." *Id.* at 327 (citation omitted); *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him").

At least two of Nevada's procedural rules that the Ninth Circuit has found to be adequate to bar federal court review would apply if Petitioner were to attempt to present his unexhausted claims to the Nevada courts. NRS § 34.726. imposes a general one-year deadline for the filing of petitions for post-conviction relief. *See Williams v. Filson*, 908 F.3d 546, 5577-80 (9th Cir. 2018) (discussing the adequacy of § 34.726 as a procedural bar to federal review). NRS § 34.810 requires dismissal of claims that could have been raised on direct appeal or in a prior post-conviction proceeding but were not. *See Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003) (holding § 34.810 to be an adequate and

1 independent state ground sufficient to deny federal review of claims).

2 Nevada has cause-and-prejudice and fundamental-miscarriage-of-justice
3 exceptions to its procedural bars that are substantially the same as the federal standards.
4 See *Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004); *Mitchell v. State*, 149
5 P.3d 33, 36 (Nev. 2006). Thus, if a petitioner has a potentially viable cause-and-prejudice
6 or fundamental-miscarriage-of-justice argument under the substantially similar federal and
7 state standards, then the petitioner cannot establish that state court remedies are no
8 longer “available.” For that reason, this Court is normally reluctant to find an otherwise
9 unexhausted claim to be “technically exhausted,” but procedurally defaulted, unless the
10 petitioner represents that he would be unable to establish cause and prejudice or a
11 fundamental miscarriage of justice in a return to state court. Here, Petitioner has made
12 such a concession (ECF No. 46 at 12-14), and Respondents have raised no objection.
13 Thus, the claims this Court previously identified as unexhausted will now be considered
14 procedurally defaulted.

15 Petitioner's concession means that Ground Four of his petition, wherein he alleges
16 the trial court's plea canvass did not meet constitutional standards, must be dismissed as
17 procedurally defaulted. As to his other two unexhausted claims, however, his concession
18 does not rule out the possibility of him obtaining federal court review. That is because
19 Ground One and the unexhausted portion of Ground Five allege ineffective assistance of
20 trial counsel. For ineffective assistance of trial counsel claims, the federal courts recognize
21 a potential basis to overcome a procedural default that the Nevada state courts do not.

22 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that the absence
23 or inadequate assistance of counsel in an initial-review collateral proceeding may be relied
24 upon to establish cause excusing the procedural default of a claim of ineffective assistance
25 of trial counsel. *Id.* at 9. The Supreme Court of Nevada does not recognize *Martinez* cause
26 as cause to overcome a state procedural bar under Nevada state law. See *Brown v.*
27 *McDaniel*, 331 P.3d 867, 875 (Nev. 2014). Thus, a Nevada habeas petitioner who relies
28 upon *Martinez*—and only *Martinez*—as a basis for overcoming a state procedural bar on

1 an unexhausted claim can successfully argue that the state courts would hold the claim
2 procedurally barred but that he nonetheless has a potentially viable cause-and-prejudice
3 argument under federal law that would not be recognized by the state courts when
4 applying the state procedural bars.

5 That is the situation here. Accordingly, the Court will provide Petitioner with the
6 opportunity to establish cause for his procedural defaults under *Martinez*. He can do so
7 “by demonstrating two things: (1) ‘counsel in the initial-review collateral proceeding, where
8 the claim should have been raised, was ineffective under the standards of *Strickland v.*
9 *Washington*, 466 U.S. 668 (1984),’ and (2) ‘the underlying ineffective-assistance-of-trial-
10 counsel claim is a substantial one, which is to say that the prisoner must demonstrate that
11 the claim has some merit.’” *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting
12 *Martinez*, 566 U.S. at 14). Whether Petitioner’s ineffective-assistance-of-trial-counsel
13 claims are substantial, and whether post-conviction counsel was ineffective for failing to
14 raise them, are questions that are intertwined with the merits of the claims themselves.
15 The Court will therefore defer consideration of the cause-and-prejudice argument under
16 *Martinez* with respect to Ground One and Ground Five (in part) until the time of merits
17 consideration.

18 **B. Motion for Stay and Abeyance**

19 As discussed above, Petitioner’s concession that he cannot overcome the state
20 procedural rules that bar state court review of his claims means that all of his claims are
21 technically exhausted. Thus, based on Petitioner’s own representations, an exhaustion
22 stay would serve him no functional purpose. In addition, a stay for exhaustion purposes is
23 only available if a petitioner can demonstrate good cause for his failure to exhaust his
24 unexhausted claims. See *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (outlining
25 standards federal courts should apply in deciding whether stay and abeyance is
26 appropriate). Petitioner’s motion fails to meet this requirement. (ECF No. 67 at 6-7.) Thus,
27 his motion for stay and abeyance will be denied.

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1 **IV. CONCLUSION**

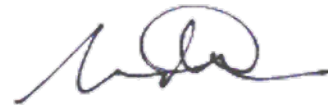
2 It is therefore ordered that Petitioner's motion to excuse exhaustion (ECF No. 46)
3 is granted. Ground Four of his second amended petition (ECF No. 29) is dismissed as
4 procedurally defaulted. The Court defers until merits consideration a determination of
5 whether Petitioner can establish cause and prejudice under *Martinez* for the procedural
6 default of Ground One and/or the part of Ground Five premised on counsel's failure to
7 challenge the sentence enhancement. The parties will address the procedural default of
8 these claims as well as the merits of the claims in forthcoming briefing.

9 It is further ordered that Respondents file an answer to all remaining claims in the
10 petition within 60 days of the date of this order. The answer must include substantive
11 arguments on the merits as to each remaining ground in the petition. In filing the answer,
12 Respondents must comply with the requirements of Rule 5 of the Rules Governing Section
13 2254 Cases in the United States District Courts and must specifically cite to and address
14 the applicable state court written decision and state court record materials, if any,
15 regarding each claim within the response as to that claim.

16 It is further ordered that Petitioner may file a reply within 45 days of service of an
17 answer.

18 It is further ordered that Petitioner's motion for stay and abeyance (ECF No. 47.) is
19 denied.

20 DATED THIS 8th day of July 2020.

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23 MIRANDA M. DU
24 CHIEF UNITED STATES DISTRICT JUDGE
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